

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D.C. 20001**

DATE: October 1, 1997

CASE NO. 95-INA-449

In the Matter of:

SPORTS HARBOUR
Employer,

on behalf of

MOJGAN FAGHIH-SABET
Alien

CASE NO. 95-INA-603

In the Matter of:

SPORTS HARBOUR
Employer,

on behalf of

MARJAN FAGHIH-SABET
Alien

Before: Burke, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. These cases arises from an employer's request for review of the denials by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title

20.

Under 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

Dates and page numbers referenced herein apply to case no. 95-INA-603.

STATEMENT OF THE CASE

On September 20, 1993, Sports Harbour, Employer, filed applications for alien employment certification to enable Mojgan Fagih-Sabet and Marjan Faghih-Sabet, Aliens, to fill the position of International Specialty Cook. The duties of the job were described as follows:

The occupant of the position will be required to prepare a variety of International Specialty Dishes such as chicken, zucchini, and roast beef. This applicant must be thoroughly versed in the proper seasoning of food, measuring and mixing ingredients according to prescribed recipes and drawing on his own skills and knowledge using a wide variety of kitchen utensils and equipment such as blenders, mixers, slicers and tenderizers to prepare a variety of salads, soups, sauces.

Will be required to adjust thermostatic controls and to regulate temperatures of ovens, broilers, grills and roasters.

Responsible for some estimates regarding consumption requirements and purchase of some supplies.

The major duties that are required for this position are listed immediately below with an estimate of time:

- (A) preparation of various meals.....70%
- (B) estimating purchasing of food and supplies...20%
- (C) sanitation and maintenance.....10%

Employer required that applicants have two years of experience in the job offered and twelve years of education. Employer also required a resume. The rate of pay was \$12.00 per hour. (AF 20)

The CO issued a Notice of Findings (NOF) proposing to deny certification on October 4, 1994. (AF 17-19) The CO stated that Employer is in noncompliance with 20 CFR 656.20(c)(8) in that no bona fide job opening exists to which qualified U.S. workers can be referred. The CO stated that it appears that the jobs were created for the Aliens.

The CO also stated that Employer has submitted two labor certification applications for

international specialty cooks; that the first had an American cuisine menu, while the second had Iranian and foreign specialty dishes which would be served in the restaurant. The CO described the second menu as a photocopied patch work with the owner's card tacked on the side. Employer was said to have explained that the American cuisine menu pertained to the sports bar.

The CO stated that he called the Employer's restaurant and was told that no Iranian dishes are on the menu in the sports bar or the restaurant and that none are planned. In addition, the CO stated that \$6.82 per hour is the highest wage paid by Employer to any employee. Yet, Employer proposes to pay \$12.00 per hour to the Aliens.

The CO instructed Employer to submit convincing original documentation in each case to substantiate that a bona fide job opening exists. In addition, Employer must submit documentation that he has sufficient funds to pay the wage of \$12.00 per hour to the specialty cooks. Employer was also instructed to state (1) how the specialty cook job duties were performed prior to hiring the Alien; (2) how many employees are at the location and in what capacity they are employed; and (3) whether the Alien has a financial interest in the restaurant or is related to the owner.

Employer, by counsel, submitted rebuttal dated November 7, 1994. (AF 7-16) Employer stated that the restaurant does serve foreign foods including Iranian specialties. Regarding the CO's telephone call, Employer stated that "it is highly unlikely that employees or managers would have the knowledge of what the business offers." (AF 7-8) To substantiate that the job is bona fide, Employer submitted two unsigned letters confirming discussions to purchase unidentified food supplies from Tehran Market and a menu and business cards reflecting the type of food available. Employer also stated that financial records were enclosed to verify that funds are available to pay the advertised wages. However, these records are not in the file.

Employer also stated that he has been training current employees to perform the specialty cook duties; that there are 17 employees at the restaurant; that the Aliens do not have a financial interest in the restaurant; and that the Aliens are not related to the owner.

The CO issued a Final Determination denying certification on December 1, 1994. (AF 5-6) The CO stated that Employer failed to submit financial data to document its ability to pay \$12.00 per hour to the specialty cooks and did not specify the number of employees who are cooks in training. The CO also stated that Employer's new printed menu and business card bear the name Sports Harbor, not Sports Harbour as stated on the labor certification application. The CO stated further that no distinction was made in the labor certification application that the specialty cook would be working in the sports bar or the dining room even though each reportedly has its own menu. The CO concluded that there does not appear to be bona fide job opening to which U.S. workers can be referred. 20 CFR 656.20(c)(8)

Employer, by counsel, requested administrative-judicial review by letter dated December 20, 1994. (AF 1-4) Employer, by counsel, submitted briefs which were accompanied by financial reports. Employer contends that the financial reports were submitted with its rebuttal to NOF.

DISCUSSION

When the issue of the Employer's ability to pay the offered wage is reasonably raised by the CO , Employer, who has the burden of proof, must provide the requested documentation or the labor certification application may be denied. Kogan & Moore Architects, Inc., 90-INA-466 (May 10, 1991) Here the CO noted in the NOF that the wage being offered to the Aliens was substantially higher than the wages paid to any of Employer's other employees and directed Employer to provide documentation that would demonstrate its ability to pay the higher wage. 20 CFR 656.20(c)(1) Given the circumstances, this request was reasonable and should have been compiled with.

Employer contends in its requests for review and in its appeal brief that it submitted a financial report to verify its ability to pay the stated wage. The CO stated in the Final Determination that Employer had not submitted financial documents (AF 6); none are contained in the file compiled by the CO in either case. Employer did submit financial reports to this office, in each case, after the cases were docketed on appeal.

Since the CO denied receipt of Employer's financial reports and Employer offered no documentation or substantiation to support its contention that they were filed with Employer's rebuttal to the NOF, Employer has not carried its burden of proof on this issue and has not established that the financial reports were timely filed. Accordingly, we conclude that Employer's financial reports were not timely filed while this matter was pending before the CO and that Employer's failure to provide the information supports the denial of certification. Gencorp, 87-INA-659 (Jan. 13, 1988) (en banc). By not submitting the financial data in a timely manner, Employer did not demonstrate its ability to pay the wage offered to the Alien. Hence, it did not demonstrate that bona fide job openings exist. 20 CFR 656.20(c)(8)

Submission of financial data while the case is on appeal in this office did not cure the defect. Gnaw Auto Sales & Parts, 91-INA-352 (Dec. 16, 1992)

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of panel:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.